No. 12340

In The

United States Court of Appeals

For the Ninth Circuit

BOOTH-KELLY LUMBER COMPANY, a Corporation,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

and

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellant,

vs.

BOOTH-KELLY LUMBER COMPANY, a Corporation,
Appellee.

Appeal from the District Court of the United States for the District of Oregon

HONORABLE JAMES ALGER FEE, *Judge*

Brief of Appellant Booth-Kelly Lumber Company

KOERNER, YOUNG, SWETT & MCCOLLOCH,
JAMES C. DEZENDORF,
ALFRED H. CORBETT,
800 Pacific Building, Portland, Oregon,
Attorneys for Appellee.

VEAZIE, POWERS & VEAZIE, and
JAMES ARTHUR POWERS,
611 Corbett Building, Portland, Oregon,
Attorneys for Appellant.

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES—Continued

TABLE OF CASES—Continued

STATUTES

MISCELLANEOUS

No. 12340

In The United States Court of Appeals For the Ninth Circuit

BOOTH-KELLY LUMBER COMPANY, a Corporation, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, *Appellee*,

and

SOUTHERN PACIFIC COMPANY, a Corporation, *Appellant*

vs.

BOOTH-KELLY LUMBER COMPANY, a Corporation, *Appellee*.

Appeal from the District Court of the United States for the District of Oregon

HONORABLE JAMES ALGER FEE, *Judge*

Brief of Appellant Booth-Kelly Lumber Company

JURISDICTIONAL STATEMENT

This is an action at law between citizens of different states, (Pre-trial Order, T. 33) in which the appellee corporation claims damages of $46,568.99 against the appellant corporation. (Pre-trial Order, T. 37) Judgment in the sum of $22,000.000 has been entered, based

upon findings of fact and conclusions of law made and entered by the court. (Judgment Order, T. 56) It is contended that the United States District Court for the District of Oregon has jurisdiction of this action on the basis of the above facts, under 28 U.S.C.A., section 1332 (a) (1); and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal, under 28 U.S.C.A. sec. 1291. (T. refers to transcript of record.)

STATEMENT OF THE CASE

(Appellant is referred to herein as "Booth-Kelly" or "Industry"; Appellee is referred to herein as "Southern Pacific" or "railroad.")

Powers, a brakeman, was injured while employed by Southern Pacific in switching operations on a spur track near Springfield, Oregon. The accident occurred February 8, 1945. At the time of the accident Southern Pacific was carrying on operation for its own benefit in serving a third party; Southern Pacific was doing nothing on behalf of Booth-Kelly or for the benefit of Booth-Kelly at the time of the accident. The Southern Pacific was then acting as a common carrier. The injured brakeman brought an action against his employer, Southern Pacific in the state court in California. Southern Pacific was the sole defendant and the action was based

upon a violation of the Federal Employers' Liability Act. The jury therein found the Southern Pacific liable as employer for failing to provide its employee with a safe place to work, specifically, a failure to warn him that there was a wood cart near the side track. (Admitted Facts, T. 35) The judgment assessed against the Southern Pacific was compromised by paying Powers the sum of $44,699.45. The recovery in the California Court was based solely on negligence of Southern Pacific. The evidence shows that Southern Pacific continued to operate its trains over said spur track for a period of several days with full knowledge that the cart was there, and in the same position it was in when the accident occurred.

Southern Pacific then filed action against Booth-Kelly in the Oregon Federal District Court for said sum plus $1,869.53, costs and attorneys' fees. The claim is made in said action that Southern Pacific is entitled to recover from Booth-Kelly under an indemnity provision contained in a spur track agreement. The spur track was a long one and the first 2,257 feet thereof was owned by the Southern Pacific and was used jointly with Booth-Kelly. The accident occurred within about 200 feet from where the spur track joins the main line as a locomotive and caboose were backing up after having delivered five cars of logs to the Springfield Plywood Company. (T. 103, 90) The caboose was a converted box car with no regular steps or railings at the front or back but

merely had a side door with grab-irons which made it necessary for the brakeman to back out and thus expose his body beyond the side door. (T. 95-96) (Reporter's Transcript, P. 145-7, 167, 172.)

The accident occurred when Powers was backing out of the caboose and he was caught between it and a wood cart placed within 42 inches of the track. (Reporter's Transcript, Powers v. Southern Pacific Company, P. 165.) It is contended by the Southern Pacific that the cart was an obstruction forbidden by the track agreement and that therefore Paragraph 7 of the agreement comes into effect requiring Booth-Kelly to indemnify the railroad for Power's injuries. (T. 11) In their view the failure of the railroad, specifically of Power's conductor and the other three members of the crew, to notify Powers of a fact which they admittedly all knew, namely the proximity of the cart to the track, does not bar the railroad's recovery over. (Reporter's Transcript, P. 130, 283.) Yet this failure to warn was the sole basis for the judgment in the California action since any question of the railroad's responsibility for the location of the cart was excluded. (Admitted Facts, T. 35.)

To summarize, both parties rely on the judgment in the California action and deem themselves bound thereby. (Admitted Facts, T. 36.) One of the basic questions for decision is the effect of that judgment in this action,

in view of the admitted fact Booth-Kelly was tendered the defense of the California action but did not assume it. (T. 35) We contend that the judgment there shows the Southern Pacific's failure to warn to be the sole basis of Power's recovery and further that the railroad's failure to warn was the proximate cause of Power's injuries.

The second basic question is the validity and applicability of the indemnity provision of the contract. The agreement in force at the time of the accident was entered into on or about June 30, 1941, but it is the Southern Pacific's redraft of two agreements made in 1909 which are terminated by it. (T. 19) The track had been constructed on the "old" industrial basis by which the railroad furnished the metal and the future maintenance. We contend that same basis was laid down in two Oregon statutes which are now codified as 8 O.C.L.A. sec. 113-108, 109, 110.

Those statutes plus 8 O.C.L.A. sec. 113-104 require the railroad as a common carrier in Oregon to furnish side track service. (Texts set out in the brief.) In the 1941 agreement the railroad as a part of the redrafting inserted a new provision, the indemnity clause (Paragraph 7). (T. 11) We contend that both the legal requirement of service and the unilateral modification of the contract amount to a lack of consideration for the indemnity agreement.

The meaning and validity of the clause so far as it pertains to third person injuries is basis of most of the controversy here. However, Paragraph 7 must be construed in conjunction with Paragraph 4 which gives the railroad control of the track and the right to use it to serve others than Booth-Kelly. (T. 8) In fact the track was used to serve the Springfield Plywood Company and the Huntington Shingle Mill and for general switching purposes. (T. 89, 105) Furthermore, since the first sentence in Paragraph 7 specifically restricts its application to when the railroad is serving Booth-Kelly, the second sentence in the paragraph is also so restricted. Finally we contend that the indemnity clause as it was construed and applied below violates the Oregon rule that it is against public policy for a person to be indemnified against his own negligence.

The third basic question is the construction of the contract apart from the indemnity clause. There was no breach of the contract to bring the indemnity clause into play since the words of Paragraph 5 as to clearance do not cover the situation here presented, a moveable cart. (T. 8) Secondly, as a matter of law the location of the cart, if it was a breach, did not cause the accident since the Appellee knew of the breach long prior to the accident. (T. 54) Finally the breach, if any, was waived by the Appellee and in addition Appellee is estopped by

a failure to conform to the customary method of removing obstructions.

The case came on for trial in the Oregon District Court before Judge James Alger Fee sitting without a jury on November 11, 1948. On the same day a Pre-trial Order, agreed upon at a conference between counsel and the Court, was approved and entered. It was ordered that the Pre-trial Order supersede the pleadings. Defendant moved for an involuntary non-suit based upon the following propositions resulting from analysis of the Transcript in *Powers v. Southern Pacific Company* (Exhibits 2c, 2d, 2c); in summary they are: that the primary negligence was found to be on the Southern Pacific Company; that all the negligent acts concerned the Southern Pacific Company; that there was a duty on the part of the railroad; that the action was brought under the Federal Employers' Liability Act; and the jury found under the charge that the negligence of the Southern Pacific Company proximately caused the injury complained of and judgment was entered on the basis that Southern Pacific's negligence was the proximate cause of the injury, or the Southern Pacific's negligence combined with the negligence of the injured man, proximately caused the accident. (T. 66) Motion for involuntary non-suit was overruled, and exception taken. (T. 77).

After the plaintiff rested, the defendant moved for

a directed verdict. (T. 112) (Court denoted it a motion for judgment as a matter of law. T. 113.) Motion was based on the following grounds (summarized): that under the law plaintiff is not entitled to recover on any of its counts; that it appears from the evidence that they have submitted and under the stipulation the primary cause or loss was the railroad company's own negligence, and that a common carrier cannot recover under such a contract if it is a loss suffered through its own negligence or, for that matter, the negligence of the company combined with that of anyone else; that when the accident occurred logs were being moved for the Springfield Plywood Company and all agreements, starting with the earliest, consistently reserve to the railroad the right to use the railroad in its own business and that there is nothing in the contract which makes clear that if the railroad was doing something for its own benefit, operating as a common carrier, hauling other people's freight, that this defendant would not be required to indemnify the railroad; that one tort feasor can't recover from the other, under the laws of Oregon; and further on all the grounds previously mentioned in connection with the motion for a non-suit are here incorporated. (T. 112-113) The motion for a directed verdict was denied. (T. 113)

On June 22, 1949 the court filed its Findings of Fact and Conclusions of Law and a judgment order for the

plaintiff was entered in sum of $22,000.00 plus costs and disbursements taxed at $27.64. On July 22, 1949 the defendant filed notice of appeal and the plaintiff filed notice of cross-appeal.

All questions raised are by objections to certain of the court's Finding of Fact and Conclusions of Law which are set out particularly in the brief under each specification of error.

SPECIFICATION OF ERROR NO. 1

The judgment in the California Action is binding upon the parties as to the cause of Appellee's loss and the matter cannot be relitigated in the Federal Court. (Appellant's Appeal Point 4, T. 129)

Specifically the court erred as it made the following Finding of Fact without any evidence to support it:

"The loss and damage to Powers were not proximately caused by the conditions mentioned in the previous findings." (Previous to Finding of Fact 18) (Findings of Fact # 18, T. 54)

The court further erred as a matter of law in making and entering the following Conclusion of Law:

"The determinations in the Mack D. Powers' action against plaintiff are not res adjudicata in this proceeding." (Conclusion of Law # 2, T.55)

SUMMARY OF ARGUMENT OF THE ABOVE SPECIFICATION OF ERROR

POINT ONE: Principle of res judicata as to the first action now binds indemnitee railroad.

POINT TWO: Where a corporation is responsible over to another corporation by an express contract of indemnity and is notified of the pendency of a suit against the indemnitee and the defense of that suit is tendered the indemnitor, the indemnitor will be bound by the issues decided in the first action when the indemnitee in a second action sues the indemnitor on the contract. The rule that privity is necessary for estoppel by judgment has an exception where a person having a derived liability like the indemnitor corporation is concerned; therefore all issues necessarily decided in the first action are res judicata as against the notified indemnitor corporation.

ARGUMENT: POINT ONE

The indemnitee railroad is bound by the findings of the first action as to any negligence of which it was there found guilty. As will be shown subsequently, the railroad was held in *Powers v. Southern Pacific Company* for its sole negligence. We now cite authority to show that such findings are now res judicata as to the

railroad. First the railroad *agreed* below that "both parties to this action are bound by the proceedings and judgment in the action, Mack D. Powers v. Southern Pacific Company as to all matters there determined." (Pretrial Order, Admitted Facts, Par. IX, T-36.)

Second as a matter of law the indemnitee is bound by the determinations there adverse to its claim for indemnity. By way of introduction the Restatement of the Law of Judgments may be helpful. Section 107 is concerned with the "Rights of Indemnitee and Indemnitor Inter Se after Judgment against One of Them." (P. 511) Comment h (Findings adverse to indemnitee's claim for indemnity) on that section is particularly in point here (P. 517):

> "In actions between the indemnitor and indemnitee, the indemnitee is subject to the burdens, as well as entitled the benefits, of the rules of res judicata with reference to the matters determined in an action brought by the obligee or by the injured person. If the judgment is based on a finding of fact which if correct would discharge the indemnitor, the latter is discharged from liability to the indemnitee by such finding, unless by agreement the entire defense is controlled by the indemnitor."

The comment continues on page 518 with an illustration applicable to the facts here:

> "So where a person has been hurt by a telephone wire which was electrified by touching a power wire

> and the injured person sued the telephone company and judgment was given against the telephone company on the ground that it knew of the danger, the telephone company, which had unsuccessfully invited the power company to defend the action, is bound by the finding in its subsequent action for indemnity against the power company."

Nor is authority lacking that the indemnitee is bound by what was decided in the first action. In *Edinger & Co. v. S. W. Surety Insurance Co.*, 182 Ky. 340, 345, 206 S.W. 465, the court is explicit on the point:

> "If the judgment in one state of facts will be conclusively binding on the insurance company (indemnitor) on the theory that it established its liability, we perceive no reason why the judgment on another state of facts that excused it from liability would not be conclusively binding on Edinger & Company (indemnitee)." (Insertions added.)

In that case it was held that the insurance company was not liable to indemnify Edinger & Company because the first action established a fact as to the subject of insurance which put the damage within an exemption clause in the policy.

In *Central of Georgia Ry. Co. v. Macon Ry. & Light Co.*, 9 Ga. App. 628, 71 S. E. 1076, a Central railroad employee was electrocuted when a worn electric wire crossed a coal chute cable which he was pulling in order

to load a locomotive tender. The court's syllabus (Par. 5) summarizes as follows:

> "Where a right of action over against a third person is asserted by the defendant in a prior tort action who has been compelled by the judgment thereon to pay damages, the plaintiff in the second action is estopped from showing that the causes alleged in the prior action were not the true causes of the damages." (P. 629)

To like effect is the court's assertion in *Hudson Valley Ry. Co. v. Mechanicville E. L. & G. Co.*, 101 Misc. Rep. 152, 166 N.Y.S. 816, 817, *reversed on other grounds*, 180 App. Div. 86, 167 N.Y.S. 428, that since the action was based on the judgment in the prior case

> "plaintiff may not deny or contradict the facts, upon which it was recovered, with other facts, but must accept the findings there made upon the questions there litigated and determined (citations)."

Upon the basis of the above authorities it would seem that the plaintiff below must accept what the California jury found to be the cause of the damage and is now estopped to show that the cause of Powers' injuries is any other than that which we will show the jury found, namely, a failure to warn.

ARGUMENT: POINT TWO

The leading case for the proposition that where a party is responsible over to another, and is duly notified of the suit, he will be bound by a judgment fairly obtained against the other, is *Littleton v. Richardson*, 34 N.H. 179, 187. The following excerpt from that case is often quoted as representative of the law:

> "But when a person is responsible over to another, either by operation of law or by express contract — (citation) — and he is duly notified of the pendency of the suit and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given such person, the judgment, if obtained without fraud or collusion — (citation)—will be conclusive against him, whether he appeared or not; (citation). Of every fact established by it; (citations) . . ."

The United States Supreme Court has adopted that rule. In *Washington Gas Light Co. v. Dist. of Columbia*, 161 U.S. 316, 329, 16 S. Ct. 564, 40 L. Ed 712, the court said:

> "As a deduction from the recognized right to recover over, it is settled that where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice is given to the latter, and full opportunity be afforded him to defend the action. There

is here no question of the sufficiency of the notice, or of the ample adequacy of the opportunity given the Gas Company to defend the suit had it elected to do so.

"In both *Chicago v. Robbins* and *Robbins v. Chicago, ub. sup.*, (2 Black 418, (U.S. 1862), 4 Wall. 657 (U.S. 1866).) this court, after announcing this rule as to the liability over in the language already quoted, also held that where, in the first suit, proper notice was given to the party liable over, the first judgment would be conclusive against the latter in the action to recover." (citations added)

The Oregon court in *Astoria v. Astoria & Columbia R. Co.*, 67 Or. 538, 136 Pac. 645, adopted the rule that the first judgment is conclusive on the person liable over who is defendant in the second suit as to all subjects in controversy in the first action. In that case a pedestrian had recovered from the city for an injury sustained due to the way in which a railroad track was placed in a public street, the railroad company having been granted a right of way on the street. Here as there the party allegedly ultimately liable was notified and requested to assume the defense of the action and in both cases refused. (Pretrial Order, Admitted Facts, Paragraph V)

The court said at P. 549:

"4. The next question to be considered concerns the legal effect to be given to the judgment obtained by Annie Anderson against the City of Astoria in the United States Circuit Court for Oregon. The lower

court advised the jury that the judgment was conclusive evidence of the following facts . . . . . An examination of the pleadings in the original case reveals that the issues which the court told the jury were conclusive on defendant were all subjects of controversy therein. *Consequently the judgment in that action is conclusive of the facts thereby established and could not again be the subject of litigation between plaintiff and defendant if the latter was notified of the former action. The scope of the estoppel created by the judgment in the primary case embraces all of the issues determined by it.*" (emphasis supplied)

Nor does the Astoria case stand alone in Oregon. In *Riggs v. New Jersey Plate Glass Co.*, 126 Or. 404, 416, 270 Pac. 479. The Court said:

"13. Where the indemnitor is notified of the pendency of an action against the indemnitee in reference to the subject matter of the indemnity and is given an opportunity to, and does defend such action, the judgment in such action if obtained without fraud and collusion, *is conclusive upon the indemnitor as to all questions determined therein which are material to a recovery against him in an action for indemnity brought by the indemnitee:* 31 C.J. 460; Section 60. See *Fenton v. Fidelity & Cas. Co.*, 36 Or. 283 (56 Pac. 1096, 48 L.R.A. 770); *Astoria v. Astoria & Col. Riv. R. R. Co.*, 67 Or. 538 (136 Pac. 645, 49 L.R.A. (N.S.) 404)." (emphasis supplied)

In 40 L. R. A. (N.S.) 1172 a note on the "Conclusiveness of judgment against a constructive tort feasor in a subsequent action for contribution or indemnity" says of "notice or its equivalent" (P. 1174):

> "Where the present defendant had notice of the former suit or its equivalent, the judgment therein is conclusive upon him, so far as it relates to matters necessarily included in the adjudication." (citing many cases)

That is the law in Oregon: *Riggs v. New Jersey Plate Glass Co., supra; Astoria v. Astoria & Columbia River R. Co., supra.*

133 A.L.R. 181 annotates "judgment in action growing out of accident as res judicata, as to negligence or contributory negligence in a later action growing out of same accident by or against one not a party to earlier action". The subtopic "VI.a. Defendant in earlier action as plaintiff in action against new party, 190" is particularly in point here. The point of the annotation for our purposes is summarized at page 196:

> "A judgment for the plaintiff in an action arising out of an accident has been held to be *res judicata, or conclusive,* as to the issue of negligence, against one not a party to such action but made a defendant in a subsequent action as derivatively responsible." (emphasis supplied)

See also 123 A.L.R. 704, Judgment in action by third person against insured as res judicata in favor of indemnity or liability insurer which was not a nominal party.

The language of the cases is usually that the first judgment is "conclusive" on the indemnitor when the

indemnitee sues. By this is meant that the first judgment is res judicata. For example throughout the above annotation, 133 A.L.R. 181, as we have emphasized in the last quotation "res judicata or conclusive" have consistently been used as alternative equivalent formulas. (Pages 184, 190, 192) An eminent treatise writer writes:

> "When it is said that judgment in this class of cases is conclusive on the person notified, the statement must of course be considered in connection with the general principles which determine the effect of judgment as res judicata." 1 Freeman, *Judgments*, Section 450 (5th Ed. 1925) 991.

Lest there be any confusion it should be noted that the court in its Conclusion of Law said that the determinations in the earlier action were not "res adjudicata". According to Black's Law Dictionary (3rd Ed. 1933) 1538 "res adjudicata" is a

> "common but indefensible misspelling of *res judicata*. The latter term designates a point or question or subject-matter which was in controversy or dispute and has been authoritatively and finally settled by the decision of a court."

The general rule is that there must be mutuality of estoppel if the judgment in the first action is to be res judicata in the second action: "the strict rule however that a judgment operates as res judicata only in regard to parties and privies, has been expanded in many cases

to include others, as those occupying a position of derivative responsibility only . . . . " 112 A. L. R. 404.

Although the general language of the cases is that the first judgment is "conclusive" on the indemnitor in the second action, some cases specifically call the earlier decision res judicata. *Hartford Acc. & Indemnity Co. v. First Nat. Bank & T. Co.* 281 N.Y. 162, 22 N.E. 2d 324; *City of Seattle v. Peterson & Co.*, 99 Wash. 533, 170 Pac. 140. The following cases support the proposition that the first judgment against the indemnitee is conclusive or res judicata in the second action when the indemnitee sues his indemnitor; and the fact situations involved are analogous to that in the case at bar (except in *State Bank v. American Surety Co.*, 206 Minn. 137, 288 N.W. 7):

Boston & M.R.R. v. Brackett, 71 N.H. 494, 53 Atl. 304;

Boston & M.R.R. v. T. Stuart & Son Co., 236 Mass. 98, 127 N.E. 532;

Missouri, K. & T. Ry. Co. v. Ellis, 78 Okla. 150, 189 Pac. 363;

West Jersey & S.S.R. Co. v. Atlantic City Electric Co., 107 N.J.E. 457, 153 Atl. 254;

Hudson Valley Ry. Co. v. Mechanicville Electric Light & Gas Co., supra;

Sanitary Dist. v. U. S. Fidelity & Guar. Co., 392 Ill. 602, 65 N.E. 2d 364;

Keller v. City of Fargo, 49 N.D. 562, 192 N.W. 313.

In summary then as the Oregon court points out in *Astoria v. Astoria & Columbia R. Co., supra,* the judgment in the primary action creates an estoppel as to the indemnitor on all the issues determined by it. The basis of res judicata is estoppel. 15 R.C.L. 960. Since the notified indemnitor is estopped by his failure to defend against the first judgment, the material issues decided in the first action are res judicata in the second action. This rule of conclusiveness is no different where a foreign judgment is involved. *U.S. Fidelity Co. v. Martin,* 77 Or. 369, 149 Pac. 1023.

SPECIFICATION OF ERROR NO. II

Appellee's loss resulted solely through an act or omission of Appellee and through no act or omission of Appellant. (Appellant's Appeal Point 3, T-129)

(a) Negligence established in the California action, in action of employee against Appellee, constitutes the immediate proximate cause of the accident and injury, and Appellant's negligence, if any, is a mere remote cause; that matter is now res adjudicata.

(b) Appellee's liability to its injured workman did not arise out of the track agreement but rather out of the master-servant relationship between Appellee and its injured employee under the Federal Employer's Liability Act. (Appellant's Appeal Point 6, T-129-130)

Appeal points 3 and 6 raise questions which are substantially alike, and to the end of brevity and con-

venience we consolidate our argument thereon, treating them as a single specification of error.

Specifically the court below erred as it made the following Findings of Fact without any evidence to support them:

> "Defendant was negligent in placing and leaving the wood cart within 42 inches from the spur track."
>
> "Defendant's negligence in this regard was the active, direct, proximate and primary cause of the injury to plaintiff's employee Powers." (Findings of Fact #9 & 10, T-53)

SUMMARY OF ARGUMENT OF THE ABOVE SPECIFICATION OF ERROR

POINT ONE: Applying the principles of res judicata to POWERS V. SOUTHERN PACIFIC COMPANY, it is now res judicata that the Southern Pacific Company was there held for its own SOLE negligence as employer under the Federal Employers' Liability Act in failing to warn its employee, Powers, of a dangerous working condition. Under the spur track indemnity agreement no recovery can be had for damage suffered where such damage results from the SOLE negligence of the indemnitee railroad corporation.

POINT TWO: Applying the principles of res judicata to POWERS V. SOUTHERN PACIFIC COMPANY, it is now res judicata that the railroad's

negligence was the immediate proximate cause of the accident and injury.

ARGUMENT: POINT ONE

It is now necessary to analyze exactly what was decided in the suit of *Powers v. Southern Pacific Company*, No. 344915, in the San Francisco Superior Court of the State of California. In the Pre-Trial Order, paragraph IV of the Admitted Facts is as follows:

"IV.

"Said employee brought action against Southern Pacific Company for damages for his injuries under the provisions of the Federal Employer's Liability Act. The complaint alleged breach of Southern Pacific Company's statutory duty of using ordinary care to provide said Mack D. Powers with a reasonably safe place in which to work in that, first, it caused and permitted the wood cart to remain on the track, and second, it failed to warn him of the presence of the wood cart and the resulant insufficient clearance.

"At trial the allegation that Southern Pacific Company placed the wood cart on the track was removed from the jury's consideration because of lack of evidence. A verdict was returned for said Mack D. Powers.

"The records of said proceeding, consisting of pleadings, transcript of proceedings at trial, verdict and judgment are marked pre-trial Exhibits 2a to 2g, both inclusive." (T. 34-35)

The court in its Findings of Fact adopted all of the above paragraph IV as its finding "4", except for the last paragraph thereof pertaining to the records of the prior proceeding. (T. 52)

The suit in California was thus based solely on a statute providing for the liability of the *employer* only. The court charged the jury:

> "This case is being tried under the rules of law set forth in the Federal Employers' Liability Act, Title 45, Section 51, U.S.C.A. This law is the exclusive remedy applicable to the facts in the case before you. * * * the Federal Employers' Liability Act makes recovery absolutely dependent upon the proof of negligence of the employer, * * *" (Reporter's Transcript, Powers v. Southern Pacific Company, pp. 344-5). (45 U.S.C.A. sec. 51, pertinent part set out in appendix)

The complaint there as drawn sets forth the failure to provide a safe place to work in its two aspects as two separate and distinct causes of action. Paragraph V of the first part of the complaint sets forth the first cause of action alleging in substance that the defendant railroad negligently left a wood cart so close to the track that there was insufficient clearance for the brakeman's body and that as a direct and proximate result the plaintiff was injured. (Complaint, *Powers v. Southern Pacific Company*, p. 2) Paragraph II of the second part of the complaint alleges in substance that the defendant railroad neglected to warn the plaintiff of the presence

of the wood cart and the resultant insufficient clearance and that as a direct and proximate result thereof plaintiff was injured. (Complaint, *Powers v. Southern Pacific Company*, p. 4)

In the charge the court instructed the jury that:

> "Under the terms of the Federal Employers' Liability Act, if you find that the defendant was guilty of any negligence whatsoever as alleged in either of the causes of action set forth in plaintiff's complaint, and further find that such negligence proximately contributed to plaintiff's being injured, then your verdict must be in favor of plaintiff and against defendant." (Reporter's Transcript, *Powers v. Southern Pacific Company*, p. 364)

The jury found in favor of the plaintiff establishing that the defendant railroad was guilty of some negligence which proximately contributed to the plaintiff's being injured.

The critical question is for just what negligence did the jury hold the defendant railroad. The court in its charge excluded any question of the railroad's liability on the first cause of action for negligently causing and permitting wood cart to remain too close to the track. After reciting the undisputed facts that the railroad did not place the cart in position and the cart was not on the railroad's premises, the court said:

> "* * * therefore, you are instructed, as a matter of law in this case, that neither defendant Southern Pacific Company, nor any of its agents or servants

> or employees, caused the wood cart to be in the position in which it was at the time it struck plaintiff." (Reporter's Transcript, *Powers v. Southern Pacific Company*, p. 355)

Not only was the jury instructed that it could not hold the railroad for creating the condition by placing the cart, but it was further instructed that the railroad had no right to remove the cart once it was placed. For the court, after summarizing various admitted facts as to the ownership and location of the cart and as to who placed the cart, charged that:

> "It is further an admitted fact that the cart was not placed in position by Southern Pacific Company. In these circumstances, I instruct you, as a matter of law, that Southern Pacific Company had no right to remove that cart, and in this sense, Southern Pacific Company cannot be charged with responsibility for permitting the wood cart to be or remain in the position in which it was placed." (Reporter's Transcript, *Powers v. Southern Pacific Company*, p. 352)

It would then seem clear that the negligence for which the railroad was held consisted in its failure to warn since it neither *caused* nor *permitted* (in that it had no right to remove) the cart to remain too close to the track as Paragraph V of the complaint setting forth the first distinct cause of action alleges. (Complaint, p. 2)

To summarize then the judgment in the first case was res judicata of the fact that the railroad was held liable as an employer for negligently failing to warn its

employee of a dangerous condition. Under the Federal Employers' Liability Act that duty rested on the employer alone. 45 U.S.C.A., sec. 51, sec. 55 (pertinent parts set out in appendix) The second paragraph in clause 7 of the spur track agreement was the main reliance of the plaintiff railroad below. It consists of two parts:

> (1) "Industry also agrees to indemnify and hold harmless Railroad for loss, damage, injury or death from any act or omission of Industry, its employes or agents, to the person or property of the parties hereto and their employes, * * * while on or about said Track;"
>
> (2) "and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally."
>
> (Numbers inserted and format of paragraph altered) (T. 11-12)

It seems clear that the failure to warn the brakeman was no duty of this defendant under the facts and pleadings of *Powers v. Southern Pacific Company*. The duty under the Act to provide a safe place to work for the railroad's employee by warning him of any danger was a duty of the railroad. 45 U.S.C.A. sec. 51, sec. 55 (pertinent parts set out in appendix) There was no "act or omission" of this defendant in failing to warn the plaintiff since that was the duty of his employer.

The second clause in the indemnity paragraph pro-

vides for equal sharing of liability for any joint or concurring negligence of both parties. In this case that clause has no application since the recovery was had against the railroad for its *sole* and *non-delegable* duty to warn its employee of any danger in his working condition. The court below recognizes that when in denying defendant's motion for judgment as a matter of law (motion for directed verdict), it says:

> "The groundwork (for holding the railroad) apparently was the liability which was imposed upon the Southern Pacific Company by a failure to warn which seems to take it out of the category of things for which it can ask for indemnity * * *" (T. 113-114)

It is submitted that with so much of the court's statement we agree, but when the statement continues as follows we disagree:

> "* * * but, on the other hand, the contract is fairly specific with respect to what Booth-Kelly Lumber Company did, indemnifying itself (presumably the railroad) against *all* liability for *any* accident * * *"
>
> (Defendant's Motion for Non-Suit, T. 114) (insertions and emphasis supplied).

We disagree because the court's premise is faulty in that it fails to analyze properly the indemnity paragraph set out above. As an analysis shows, the second clause of the paragraph is the only one which may possibly be in point and that clause clearly does not contemplate

Booth-Kelly bearing "*all* liability for *any* accident."

In summary the second clause as to joint negligence has no bearing here because the California jury held the railroad for a single act of negligence, a failure to warn, and that failure was not a simple failure to warn but an employer's failure to warn. Nor was it just the failure of an employer to warn, but the failure of a special kind of employer under a federal statute of restricted application. Booth-Kelly does not stand as employer to the plaintiff, and so does not concur in negligence to produce damage indemnifiable under the second clause. The railroad was not held for any negligence in leaving the wood cart near the tracks which might be an act or omission of Booth-Kelly within the meaning of the first clause in the indemnity paragraph.

The alleged negligence of this defendant in regard to the wood cart can not be considered settled by the verdict there. "A question in issue cannot be considered settled by the verdict where the jury were instructed that such issue was immaterial." (Headnote) *Bingham v. Honeyman*, 32 Or. 129, 51 Pac. 735, 52 Pac. 755. Here the position of the wood cart was immaterial to the verdict rendered against the railroad since the jury was instructed that the railroad had no control of the cart.

In California, the following rule of res judicata was quoted with approval:

"To be a bar to future proceedings it must appear

> that the former judgment necessarily involved *the determination of the same fact* to prove or disprove which it is pleaded or introduced in evidence. *It is* not enough that the question was one of the issues in the former suit. *It must appear to have been precisely determined.*"

Purcell v. Victor Power etc. Co., 29 Cal. App. 504, 510, 156 Pac. 1009.

FAILURE TO WARN IS AN INDEPENDENT ACT OF NEGLIGENCE

Booth-Kelly's negligence regarding the wood cart was not precisely determined, but on the other hand the negligence of the Southern Pacific in failing to warn its employee was precisely determined as analysis of the record in that case has shown. Two Washington cases clarify the problem involved here. In *City of Seattle v. Peterson & Co.*, 99 Wash. 533, 170 Pac. 140, the city sued a grading contractor on his bond when a customer of the city's electrical system had been shocked as a result of the contractor's blasting which had disturbed the power lines. The customer successfully sued the city, but in the cited case judgment for the defendant contractor was affirmed. The court said of the instructions in the suit against the city at page 141:

> "Whether these instructions were right or wrong need not now be inquired into. They became the law of the case and the parties are bound by them. Under these instructions a verdict was rendered

> against the city which *established its negligence under the independent act of negligence alleged against it.* (Emphasis supplied.) The judgment entered upon that verdict is conclusive upon that point and is now *res adjudicata.*"

So also here the railroad was adjudged liable under an independent act of negligence alleged against it, a failure to warn its employee. The indemnity agreement of the contractor there is generally similar to the one here, the indemnitor there agreeing to save the indemnitee harmless from all suits for injury or damage sustained by any act or omission of the indemnitor. (P. 140)

In *City of Puyallup v. Vergowe*, 95 Wash. 320, 322, 163 Pac. 779, the court also pointed out the independent negligence of the city which was seeking indemnity:

> "It will thus be seen that negligence as to the condition of the street light, which was part of the general lighting system of the city was charged in the complaint; that evidence was submitted thereon; and that the trial judge covered the issue in his instructions to the jury. This issue was determined against the defendant city by a general verdict of the jury and, *a priori, established an independent act of negligence on the part of the city.*" (Emphasis supplied)

The foregoing is applicable here if for the "condition of the street light" we substitute a "failure to warn". The complaint in the first action had charged the city

with being negligent in having torn up the road (actually done by the contractor) and in not lighting the street. Similarily the railroad here was charged with leaving the wood cart close to the track (actually done by this defendant), and in not warning its employee.

It would seem clear that these two Washington cases established by analogy that the railroad was held in *Powers v. Southern Pacific Company* solely because of an independent act of negligence, the failure to warn. The Washington cases establish that a prior verdict may by implication determine the damage to be caused by an independent act of negligence of the indemnitee.

Here the record in *Powers v. Southern Pacific Company* does establish that the railroad was guilty of a similar independent act of negligence, and as has been shown this independent act of negligence was the sole basis on which Powers had recovery. Under the indemnity clause as drawn here there can be no recovery since it covers only Booth-Kelly's sole act or omission or the the joint negligence of the indemnitee and indemnitor. That is not sufficiently explicit in Oregon to cover the indemnitee's own sole negligence.

> "If an indemnitee negligently causes injury to a third party and thereby suffers liability and loss by reason of its own sole negligence, it is properly held that he cannot have indemnity in an action on a bond against the indemnitor, unless it is clearly made manifest in the bond that it was intended to cover the indemnitee against his own negligent

acts." *U. S. Fid. & Guar. Co. v. Thomlinson Co.*, 172 Or. 307, 324, 141 P. (2d) 817.

The substance of our contention is that the recovery of Powers against the Southern Pacific rests upon a fact fatal to its recovery here, its own failure to warn its employee. *Boston & M. R. R. v. Brackett*, 71 N.H. 494, 496, 53 Atl. 304. In *American Surety Co. v. Singer Sewing Machine Co.*, 18 F. Supp. 750, 753, the court says:

> "* * * if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor, the later action against the indemnitor may not be successfully maintained. Alabama Title & Trust Co. v. Millsap, 71 F. (2d) 518 (C.C.A. 5); Gregg v. Page Belting Co., 69 N.H. 247, 46 A. 26 Buffalo Steel Co. v. Aetna Life Ins. Co., 156 App. Div. 453, 141 N.Y.S. 1027, affirmed 215 N.Y. 638, 109 N. E. 1067; Edinger & Co. v. Southwestern Surety Co., 182 Ky. 340, 206 S.W. 465."

The failure to warn is a fatal fact here because it prevents the indemnity clause coming into operation since such failure to warn is the negligence of the railroad *solely*.

ARGUMENT: POINT TWO

William Cameron & Co. v. Thompson, ... Tex. Civ. App. , 175 S.W. 2d 307, involves almost identical facts to this case and should be controlling. There was a spur track indemnity agreement similar to the

one here. A brakeman was injured by a hand truck which rolled out of a freight car as some cars on a spur track were being switched:

> "Even if it be negligence to thus leave the hand truck unblocked and the car door unclosed, such negligence could not, as a matter of law, be proximate cause of Benton's injuries, because the employees of Cameron & Company could not reasonably have contemplated that the switching crew would arrive during their absence and negligently proceed to switch the car without blocking the wheels of the hand truck and closing the door of the car. One is not required to contemplate the negligence of another (citations)." (p. 308)

The court continues on page 309:

> "It occurs to us that if the act of the unloading crew in leaving the hand truck in the car with the door open could be regarded as any cause of Benton's injuries, certainly it was a remote cause, and the proximate cause of such injury was the negligence of the switching crew in failing to properly block the wheels of the hand truck and close the door of the car before beginning switching operations. As was said by Judge Critz in Phoenix Refining Company v. Tips, 125 Tex. 69, 81 S.W. 2d 60, 61: 'prior or remote cause cannot be made the basis of an action for damages if it does nothing more than furnish the condition or give rise to the occasion which makes the injury possible. If such injury is the result of some other cause which reasonable minds would not have anticipated, even though the injury would not have occurred but for such condition.' (Citing authorities.)"

Here the accident was not such that reasonable minds would have anticipated. The wood cart here had

been in its location at least three or four days and the spur track had been used repeatedly without injury despite its presence:

> "One witness said he remembers distinctly going in the day before. Another witness said two or three days before. We know they were in there on the 30th. We know that they were in there pretty regularly, * * *" (Defendant's Argument, Reporter's Transcript, *Powers v. Southern Pacific Company*, p. 283-4.)

The court in the Thompson case continues at page 309:

> "It occurs to us that a better illustration of remote and proximate cause could not be found than is furnished by the facts in the case at bar."
> "* * * (In) the case at bar the alleged negligence of the employees of Cameron & Company was not the direct cause of Benton's injuries, and could not have in any way caused Benton's injuries except for the intervening negligence of the employees of the Railway Company."

So also here neither could any negligence of the employees of Booth-Kelly have caused Power's injuries "except for the intervening negligence of the employees" of the Southern Pacific Company. The negligence of Booth-Kelly, if any, was not the direct cause of Power's injury. *Accord*, *Central of Georgia Ry. Co. v. Swift & Co.*, 23 Ga. App. 346, 98 S.E. 256, (unlighted shed); *Glappa v. Detroit, Etc., R. Co.*, 179 Mich. 76, 146 N.W. 134, (sand on track).

The language of the court in *Keller v. City of Fargo*, 49 N. D. 562, 192 N. W. 313, in an analogous case is helpful, for there as here one of the critical questions was what the first case (suit by injured person against the city) determined insofar as the second case (suit by city against plumber) was concerned. The court says at page 573:

> "So far as Keller (indemnitor-plumber) is concerned, the judgment in the Porter case established the fact of the injury, the *physical cause of the injury*, and the effect of the injury. (Emphasis in original) *Necessarily that case determined that the city's negligence*—that is, the breach of the city's duty to keep the sidewalk reasonably safe—*was the proximate cause of the injury, and that judgment determined in what respect the city was thus negligent* * * *
>
> "Now the question of Keller's negligence has become material." (Insertion and emphasis added.)

Likewise it is submitted that here the question of the negligence of Booth-Kelly, if any, has become material. But that negligence was not decided in *Powers v. Southern Pacific Company*, any more than Keller's was when the city was sued. but that judgment did determine in what respect the Southern Pacific was negligent, namely, in failing to warn its employee, just as city's negligence was determined in the *Keller* case.

In the *Keller* case the court in the first action charged the jury that for the plaintiff to recover it must be

established that "the negligence of the defendant city was the proximate cause of the damage sustained." (p. 316) In *Powers v. Southern Pacific Company*, the court charged that Powers could recover only if there was negligence as charged in the complaint *and*, "second, that such negligence, if any there was, was a proximate cause of the accident." Reporter's Transcript, *Powers v. Southern Pacific Company*, p. 346.

As the passage quoted from the *Keller* case shows, the court there found from the charge given in the first action that the verdict in the first action decided that the city's negligence was the proximate cause of the injury to the pedestrian. Here, under a like charge which we have just set out, the California jury must have decided that the railroad's failure to warn was the proximate cause of Powers' injury, since the verdict was for Powers. Under the principles of res judicata and the authorities hitherto set out, the Southern Pacific Company is estopped to deny that its own negligence was the proximate cause of Powers' injury for which it now seeks indemnity.

The issue of proximate cause was thus closed by the judgment in Powers v. Southern Pacific Company. Furthermore as a matter of law the leaving of the cart near the track was not the proximate cause but at the most created an opportunity for the active causative

negligence of the plaintiff and its employees which this defendant was not required to foresee.

SPECIFICATION OF ERROR NO. III

There is no consideration for the contract and a total lacking of mutuality for the indemnity provision contained therein. (Appellant's Appeal Point 7, T. 130)

Specifically the court below erred in making the following Findings of Fact in that there was no competent evidence to support said findings:

"There was consideration for the indemnity provisions of the spur track agreement." (Finding of Fact No. 16, T. 54.)

SUMMARY OF ARGUMENT OF THE ABOVE SPECIFICATION OF ERROR

POINT ONE: There was no consideration for the indemnity provision since the railroad was obliged to furnish spur track service by law in Oregon under the circumstances of this case.

POINT TWO: There was no consideration for the indemnity provision was inserted in revised spur track agreement by the railroad without any new consideration moving to the lumber company and after nearly forty years of operation under prior agreements without such indemnity provision.

ARGUMENT: POINT ONE

The Southern Pacific is a "common carrier by railroad in interstate and intrastate commerce in Oregon." (Pre-Trial Order Admitted Fact, Par. I, T. 33) Nevertheless the State of Oregon may require such interstate carrier to provide spur track service. 49 U.S.C.A., sec. 1 (22), ("*Construction, etc., of spurs, switches, etc., within State.*"),

specifically states of the authority of the Interstate Commerce Commission:

> "The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

In *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry Co.*, 270 U.S. 266, 278, 45 S. Ct. 263, 70 L. Ed. 578, Justices Brandeis writing for the court said:

> "When the clauses in paragraph 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one State.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same

territory and similarly situated are entitled to like service from the carrier. *The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate.*" (Emphasis supplied)

In *Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.*, 286 Fed. 540, the court recognized that no certificate from the Interstate Commerce Commission was required for an intra-state spur track implying that the federal act is no bar to state regulation. The court then holds that the last clause of paragraph 22 applied only to electric railways and not to spur or industrial tracks.

In *People of State of California v. Zook*, 336 U.S. 725, 732, 69 S. Ct. 841, 93 L. Ed. 426, the court holds a specific saving of state laws by federal statutes is not essential, saying:

"That congress has specifically saved state laws in some instances, see e.g., The Securities Act of 1933, 15 U.S.C. Sec. 77R, indicates no policy save clarity."

The annotation to 49 U.S.C.A. Sec. 1 (22) in the 1949 Pocket Part is as follows:

"The exemptions contained in this section, do not necessarily reflect lack of constitutional power to deal with excepted phases of railroad enterprise, but reflect congressional policy of reserving, exclusively to the states, control over that group of essentially local activities. City of Yonkers v. U.S., N.Y. 1944, 64 S. Ct. 327, 320 U.S. 685, 88 L. Ed. 400, Mandate stayed 64 S. Ct. 633."

In *New York Cent. R. Co. v. Public Utilities Commission,* 119 Ohio St. 381, 164 N.E. 427, the court held that the state commission might require reasonable service from an interstate carrier for intrastate business and that the state commission had control of intra-state spur lines. *Chicago, R.I. & P. Ry. Co. v. State,* 53 Okla. 712, 157 Pac. 1039, holds that power in the Interstate Commerce Commission to require switch connections with private side tracks where interstate business will justify the same does not deprive the Oklahoma Corporation Commission of jurisdiction to require a private switch connection where intra-state business will justify it.

Oregon has in fact exercised this power left to the states to control the construction of industrial or spur tracks. 8 O.C.L.A. sec. 113-104 provides in part that:

> "All railroad shall keep and maintain adequate and suitable * * * switches, spurs, and side tracks for receiving, handling, and delivering of freight transported or to be transported by such railroad."

8 O.C.L.A. sec. 113-108 provides in substance that a shipper may require the railroad to provide a switch connection for his private track if certain requirements are met. If the railroad refuses the railroad commission is authorized to investigate and make an order requiring the connection, and such orders are to be enforceable as are any other commission orders.

> "The railroad shall furnish the rails and fastenings, and the switch, complete with frog and guard

rails, and the ties and grading shall be furnished or the expense borne by applicant." (The full text of the pertinent parts of 8 O.C.L.A. sec. 113-108 is set out in the appendix.)

Oregon has thus gone further than mere regulatory legislation; it has provided by statute that railroads must furnish spur track connections and lay such tracks.

8 O.C.L.A. sec. 113-109 is more specific than the prior sections and requires that:

> "Whenever any warehouse already built or may hereafter be built within one hundred and fifty feet of the main line of any railroad in this state, with side track graded and ties laid down without expense to the company owning or operating said road, and not less than three hundred tons of freight stored in such warehouse ready for transportation, then it shall be the duty of the said railroad company to lay down the track, with the necessary connections and switches; * * *"

8 O.C.L.A. sec. 113-110 provides a penalty of $300.00 a week for each week during which the railroad's neglect, failure, or refusal" to comply with that section (113-109) continues. (Text in appendix.)

Sections 113-109 and 113-110 were enacted together in 1885. This particular spur track was covered by agreements made on January 4, 1909 and February 27, 1909. Subsequently: (Pre-Trial Order, Admitted Facts. Paragraph II, T. 34)

> "On or about June 30, 1941, the plaintiff entered

> into an Industrial Track Agreement with defendant, covering the maintenance and operation of industrial track facilities serving defendant's Springfield Mill on premises used or owned by defendant, which agreement is marked pre-trial Exhibit 1."

To summarize the situation in 1945 when the injury occurred: the spur track on which the accident occurred was owned by the Southern Pacific and operated jointly by it and the lumber company. This operation was controlled by the 1941 agreement set out as Exhibit A. (T. 5). This 1941 agreement represents a revision of earlier similar agreements. Prior to any such agreements the railroad was obligated by the 1885 law to construct a spur track for the industry on the same terms on which it was in fact furnished. Just as 8 O.C.L.A. 113-109 required, in this case: (Exhibit A, Paragraph 12, T. 17)

> "In the construction of said Track Railroad paid for and furnished all metal required therein and Industry paid for the ties, grading, ballast and labor."

The requirements of 8 O.C.L.A. 113-108 are similar and were also met. (Text in appendix.)

It is therefore submitted that the railroad cannot impose conditions for doing its lawful duty, laying a spur track on a prepared roadbed and operating the same. We are not here concerned with any unlawful conditions which may have been imposed by the earlier track agreements. We do strenuously object to one

illegal condition which was added to the agreement when it was rewritten in 1941, namely paragraph 7, the indemnity clause. (T. 11) Doing one's legal duty is not legal consideration. There is therefore no consideration for the various spur track agreements entered into by Booth-Kelly and in particular there is no consideration for paragraph 7 in the 1941 spur track contract requiring Booth-Kelly to indemnify the railroad.

The contention that there was no consideration for the indemnity agreement since Oregon statutes under the circumstances of this case required spur track service to be provided is not only supported by the general principles of contract law but by specific authority. The court in *Cameron v. Edgemont Investment Co.*, 149 Or. 396, 405, 41 P. 2d 249 states:

> "It is the rule that a promise to pay one for doing something he was under a prior legal duty to do is not binding for want of a consideration: (Citations)".

In *Baltimore & O.S.W.R. Co. v. Cincinnati, L. & A.E. St. R. Co.*, 52 Ind. App. 639, 99 N.E. 1018, the court held a contract to pay a watchman imposed on a street railroad desiring to cross a steam railroad's track was unenforceable for lack of consideration since the street railroad had a right to cross over the steam road's tracks subject to no conditions except those imposed on the general public. The court says at page 643:

"* * * (In) other words, the consideration for ap-

pellee's promise was the consent of appellant to cross at grade its track on Walnut street.

"If appellee acquired some legal right, or any legal possibility of benefit by its promise, a sufficient consideration would be shown, but the mere consent or withdrawal of an objection by appellant to the doing of that which appellee had a legal right to do, is not a consideration sufficient to support a promise. This is so on the theory that the promisor gets nothing in return for his promise but that to which he is legally entitled. (citations)"

The *Baltimore* case was followed in two cases which hold that the giving by a railroad of a privilege that it was obligated to give as a matter of law was not consideration for imposing contractual duties on another party. *Vandalia R. Co. v. Ft. Wayne & Northern Indiana T. Co.*, 68 Ind. App. 120, 118 N.E. 839, *Terre Haute, I. & W. Traction Co. v. Ross*, 84 Ind. App. 697, 138 N.E. 90.

To like effect that performance of a legal duty by a railroad is not consideration for a contract with another party the holding in *The Kansas City, St. J. & C. B. Ry. Co. v. Morley*, 45 Mo. App. 304, Headnote 2 is as follows:

"2. **Contracts:** CONSIDERATION. A contract between a city contractor for the construction of a sewer along a street and a railway company having a right of way over such street, that the contractor would pay the company for supporting its tracks while he built the sewer is a *nudum pactum*,—without consideration,—and void."

In *South & North Ala. R. R. Co. v. Highland Ave. & Belt*

R. R. Co., 119 Ala. 105, 24 So. 114, the question was the specific performance of an agreement allowing a belt line railroad to cross another railroad. The court in dealing with the consideration necessary to make a contract entitled to such relief said:

> "Of the other matters, agreed to be performed by the Elyton Company, some were such as statutes in force at that time required it to perform, and therefore constituted no valid consideration, such as the giving to defendant or preferential rights at the crossing.—Code, Sec. 1145."

Finally the opinion of Judge Learned Hand in *China Fire Ins. Co. v. Davis*, 50 F. 2d 389, 76 A.L.R. 1259, *cert. denied* 284 U.S. 658, 52 S. Ct. 36, 76 L. Ed. 558, is an analogous authority which suggests the rule of law which ought to be controlling here. A clause in a bill of lading giving a carrier railroad the benefit of any insurance carried on a shipment was held invalid under 49 U.S.C.A. sec. 2:

> "as giving carrier greater compensation that collected for similar service." (Headnote P. 389) (Text in appendix)

Here Booth-Kelly pays the regular rate for shipping lumber, it would then seem that the indemnity clause is additional prohibited compensation over that paid by other lumber shippers. Furthermore if the legal rate is paid that is full consideration for any services the rail-

road may render; it then follows that to impose an indemnity agreement on the shipper lacks consideration since he has already paid the maximum rate legally possible for the services rendered.

In summary our argument is that the Interstate Commerce Act leaves to the states the regulation of spur tracks located wholly within one state. The track here was such a track and Oregon by statute has made specific provision to force railroads to construct and maintain spur tracks for shippers under certain conditions. Those conditions of grading and laying down the ties were met in this case. Since the Southern Pacific Company was obliged as a matter of law to furnish the spur track and service thereon, no consideration moved to Booth-Kelly for the indemnity clause imposed by the railroad's form contract and on which it now relies.

We have cited authority establishing that in analogous cases where a track or a sewer had to cross an existing railroad line that such lines could not impose contractual conditions on the constructing party where such constructing party had the legal right to cross the existing line. Secondly we have cited *China Fire Ins. Co. v. Davis, supra,* to establish that under the Interstate Commerce Act such indemnity agreement is without consideration since the freight and switching rates charged by the railroad are full lawful consideration

for spur track service. In addition the indemnity agreement is itself an unlawful attempt to impose a discriminatory rate upon Booth-Kelly.

Several subsidiary questions of law remain to be considered. First the state cases hitherto cited on consideration by implication affirm that such relationships as in providing spur tracks are statutory rather than contractual. We cite the following cases as direct authority for that proposition:

In *Chicago, R. I. & P. Ry. Co. v. State, supra,* the court sustained by implication a constitutional provision requiring switch connection to be made by the railroad in much the same way as 8 O.C.L.A. sec. 113-108 summarized above does. (Text set out in appendix.) In that case a contract to construct a side track had been breached. The court held:

> "The jurisdiction of the commission under this provision to require a switch connection to be made is not founded upon any contractual relation between the parties, nor does it arise by reason of the alleged breach of a contract to construct such switch, but it depends upon the existence of a state of facts which brings the case within the terms of said constitutional provision." (P. 721)

Likewise it is our contention that here the construction of a spur track was pursuant to Booth-Kelly's right under the Oregon statute and did not depend on any contractual relationship between Booth-Kelly and the railroad.

In *New York Cent. R. Co. v. Public Utilities Commission of Ohio,* 119 Ohio St. 381, 387, 164 N.E. 427, the court said:

> "The application for the order was for intrastate service. The Public Utilities Commission of Ohio has jurisdiction of intrastate service and over spurs and switches. The fact that the rendering of service by the common carrier may create a liability growing out of a contract does not operate to deprive such commission of jurisdiction to require service."

In *Portland Terminal Co. v. Boston & M. R. R.,* 127 Me. 428, 144 A. 390, a Maine law allowed a terminal company to be set up. Each railroad company was to pay for the use of the terminal:

> "* * * in the proportion in which it has the use thereof, the same to be fixed by the *written agreement* of all such railroad companies * * *" (P. 430) (Emphasis supplied)

In case they failed to agree a statutory procedure was provided.

The court said at page 438:

> "This provision for fixing of proportionate payments does not, we think, sound in contract. It creates no legal liability on the part of one railroad to the other, or by either to the Terminal Company, which can be enforced under the law of contract. It provides for a mutual 'expression of assent' enforcible only under the special jurisdiction conferred upon the court of equity by the Act. The statute creates the right and gives the remedy which is appropriate and therefore exclusive. (citations)"

Likewise in this case whatever contracts the parties may have entered into in relation to the provision of a spur track create no legal liability which can be enforced under the law of contracts. There the difficulty was a special equity enforcement procedure; here one difficulty is a lack of consideration since the railroad is obliged by Oregon statutes to furnish spur track service under the conditions here existing. Furthermore under the Oregon statute the remedy of the shipper is not under contract law just as is also true in the *Boston & M. R. R.* case. 8 O.C.L.A. 113-108 provides for shipper securing an administrative order from the railroad commission for service and 8 O.C.L.A. 113-110 provides for a statutory penalty of $300.00 per week which the warehouse owner may recover from the railroad.

To summarize, in both the instant and *Boston & M. R. R.* cases the parties contracted but in neither case did the agreements sound in contract. In both cases the statutory remedies are exclusive. Under this view, the purpose of the agreement here is as was said of the agreement required there:

> "* * * to prevent uncertainty, to perpetuate evidence, and create a memorial which permits of no doubt or uncertainty, it was the legislative intent that the agreement be written as to all the railroads, be intended as an 'expression of assent' and possess some degree of formality."

It lacks any legal effect because there was no consideration.

Both the *Chicago* and *Boston & M. R. R.* cases are authority for the proposition that the relationships are here statutory rather than consentual. Since the relationship is statutory and the railroad is obliged to furnish spur track service by statute there was no consideration moving to Booth-Kelly for any agreements it signed.

The second subsidiary question of law to be considered is the authority of the Oregon Legislature to pass the above cited statutes on spur tracks. In *Southern Pac. Co. v. Railroad Commission*, 60 Or. 400, 119 Pac. 727, the court held that the commission might order a spur track constructed under statutes then existing. One of the sections there relied on was Section 6897, L.O.L.; that section became 8 O.C.L.A. Sec. 113-104 in subsequent codifications and we have set it out above. Objections were made to the spur track order upon the ground of the Fourteenth Amendment to the United States Constitution, but the court held that the order was not contrary to the amendment.

In *Chicago & N. W. Ry. Co. v. Ochs*, 249 U.S. 416, 39 S. Ct. 343, 63 L. Ed. 697, the court sustained a state law under which the state commission had assessed two-thirds of the cost of a spur track against the railroad and one-third against the shipper. Here the track also has a

public character since paragraph 4 of the agreement allows the railroad to use said track in service of others and to have control of the track in general. (T. 8) And in fact at the time of the accident the railroad was engaged in such public use serving other shippers on the same track. (T. 90) The *Chicago & N. W. Ry.* case was followed in its companion case, *Lake Erie & W. R. R. Co. v. Pub. Util. Comm.*, 249 U.S. 422, 39 S. Ct. 345, 63 L. Ed. 684,

> "as to the power of a state to require a railroad company at its own expense to restore a siding, used principally by a particular plant but available generally as a public track, owned and controlled by the railroad as part of its system. P. 424."
>
> "Such a requirement does not take the Company's property for private use, or for public use without compensation, in contravention of the fourteenth Amendment. P. 425" (Headnote)

The question of the power of the state to compel a railroad to build, maintain, or connect with sidetrack for the accommodation of shippers is recognized and annotated in L.R.A. 1918B, page 786.

ARGUMENT: POINT TWO

Oregon follows the general contract rule

> "that a modification of a contract being a new contract, a consideration is necessary to support the new agreement, as, for example, where to extend the time for performance or payment or to release

one of the parties from performance." *Cameron v. Edgemont Investment Co.*, 149 Or. 396, 402, 41 P. (2d) 249.

As has been pointed out,

> "On or about June 30, 1941, the plaintiff entered into an Industrial Track Agreement with defendant, covering the maintenance and operation of indusrial track facilities serving defendant's Springfield Mill on premises used or owned by defendant, which agreement is marked pre-trial Exhibit 1." (Pre-trial Order, Admitted Facts, Par. 2, T. 34.)

That agreement is printed as Exhibit A in the record of this case. (T. 5) According to paragraph 20 of that contract, the

> "agreements of January 4, 1909 and February 27, 1909 are hereby terminated as of the date hereof." (T. 19)

These prior agreements did not contain any indemnity clause such as was incorporated in the present agreement as paragraph 7. (T. 11) That particular paragraph of the agreement, and in fact the whole first ten paragraphs in the agreement, were part of printed form contract provided by the railroad and imposed upon the shipper.

Even if it be assumed that there was consideration for the superseded agreements of 1908 and 1909, there was no consideration moving to Booth-Kelly for modifying the agreement to accept liability under a new gen-

eral indemnity provision. The printed indemnity clause of the form contract was inserted without any special attention being called to it under the guise of modernizing the ownership situation.

In summary, no new consideration moved to Booth-Kelly. Despite this fact the Southern Pacific as part of the process of rewriting the contract inserted as part of the new contract a printed form which contained a standardized indemnity clause. It is upon this printed form paragraph that recovery was had in the court below; this was error since there was no consideration moving to this defendant for that added liability.

SPECIFICATION OF ERROR IV

> The contract has no application because the indemnity provision thereof, namely Paragraph VII, is applicable only when railroad (Appellee) is serving industry and at the time of the accident railroad (Appellee) was not serving industry. (Appellant's Appeal Point 8, T. 130)

Specifically the court below erred as a matter of law in construing the indemnity clause (Paragraph 7) of the contract to cover operations on the track when the railroad was not serving Booth-Kelly, with result that it erroneously made and entered the following Conclusion of Law:

> "Plaintiff is entitled to recover judgment against defendant for the sum of $22,000.00 *on the contract*,

together with its costs and disbursements incurred herein." (Emphasis supplied) (Conclusion of Law No. 7. T. 55)

POINT ONE: Applying the usual constructional rules in this business context, the "serving industry" requirement applies to both sentences of Paragraph 7 with the result that the indemnity provision was inoperative under the circumstances here.

ARGUMENT: POINT ONE

Here the whole purpose of the agreement was to supply spur track service to Booth-Kelly for the mutual benefit of the two parties. As a concession to the railroad it was granted "the right to use the (track) when not to the detriment of Industry." (T. 8) Now the railroad is forced to contend that since the second sentence of Paragraph 7 does not repeat the serving industry clause, that Booth-Kelly is obliged to indemnify the railroad even if the railroad is engaged in serving other persons as it was here. (T. 90)

Paragraph 7 of the spur track agreement contains only two sentences: first, an indemnity agreement by Industry against its own losses and losses of the property of others on its premises arising from fires caused by the Railroad's locomotives; second, a sentence in which Industry agrees to indemnify the railroad for loss caused by Industry's negligence, or by the joint

negligence of the parties. (T. 11) The first sentence is specifically restricted to cases where the Railroad is operating:

> "on said track, or in its vicinity, for the purpose of serving said Industry * * *" (T. 11)

It is submitted that this serving Industry phrase also modifies the second sentence which is the basis of this litigation. The second sentence is closely related to the first sentence; its introductory words being "Industry also agrees * * *."

In Oregon it is settled that:

> "* * * the punctuation of an act or its title is not controlling in construing it for the purpose of ascertaining its real meaning." *State ex. rel. v. Banfield*, 43 Or. 287, 291, 72 Pac. 1093.

The same principle is applied elsewhere to contracts. *Stoddard v. Golden*, 179 Cal. 663, 178 Pac. 707, 3 A.L.R. 1060 and the annotation thereto. Furthermore Oregon, in its statutes, treats the construction of statutes and instruments in the same sections as similar problems; for example, 1 O.C.L.A. 2-217 provides:

> "In the construction of a statute the intention of the legislature, and in the construction of an instrument the intent of the parties is to be pursued, if possible * * *."

Therefore since punctuation of a contract is not controlling as to its meaning no more should paragraphing.

Here the drafter made each sentence on indemnity a separate paragraph but still lumped them under a single number, seven. We contend that the two sentences on indemnity so lumped under one number should be construed as one paragraph, with the result that the second sentence is modified by the words while "serving said Industry." If that clause so modifies the second sentence which is in litigation here, that second sentence can have no application because at the time the accident occurred the railroad was not serving Industry. (T. 90)

Even if the two sentences do not constitute one paragraph, the general principles of contract law require that the condition of serving industry be attached to the second sentence providing indemnity against the railroad's joint negligence. First,

> "The intention of the parties must be determined from a consideration of the entire instrument, and not of detached portions thereof. (Citations)" *Champion et. ux. v. Hammer et. ux.*, 178 Or. 595, 604, 169 P. (2d) 119.

It is thus clear that the second sentence should not be considered apart from the serving industry clause in the first sentence.

The court in the *Champion* case continues at page 605 with another rule of construction helpful here:

> "When clauses in a contract are repugnant and incompatible, the general rule of construction is that, unless the inconsistency is so great as to avoid the instrument for uncertainty, the earlier clause prevails. (Citations)"

The two sentences here are inconsistent if the serving industry clause applies only to the sentence in which it happens to have been placed. It is inconsistent that the parties should have agreed that Booth-Kelly was to indemnify the railroad against locomotive fire damage *only* when the railroad was serving Booth-Kelly and then in the next succeeding sentence agree it was to indemnify the railroad for losses incurred in the use of the spur track even if the railroad was serving other customers as it was here and as it had the right under the contract to do. (T. 90, 8) Under the rule of construction announced since the sentences do impose inconsistent obligations on Booth-Kelly, the earlier sentence containing the serving industry clause should prevail.

The third rule of construction favoring the interpretation that the serving industry clause modifies the second sentence is the rule that a contract is construed against its preparer particularly if it is a printed form contract. This principle has been particularly applied to form insurance contracts; it is submitted that it is no less applicable to the indemnity clause of a form spur track agreement. Here the whole of Paragraph 7 is in-

cluded in that part of the contract for which the railroad used one of its standard printed forms. The words of the Oregon court in *Keeler Bros. v. School District No. 108*, 91 Or. 316, 324, 178 Pac. 218, are substantially applicable here:

> "The plaintiff is an expert in the matter of contracts like this. It prepared the contract itself and in its own language. It deals with the officers of a school district, who are ordinarily inexperienced in such matters. We think it should be held strictly to each provision of its contract, and if there is any vagueness in the contract which it itself, has prepared, that vagueness should be construed against it rather than in its favor."

Here the railroad had it within its power to make it clear that the second sentence was not modified by the serving industry clause in the first sentence of Paragraph 7, but it failed to do so.

The fourth rule of construction favoring the interpretation that the serving industry clause modifies the second sentence is:

> "* * * the settled rule of construction that, where a contract is susceptible of different interpretations, or more of which would enable it to stand, and others which might vitiate the instrument, the construction giving effect to all its parts, and sustaining the contract and carrying out the evident intention of the parties thereto, will prevail, rather than the construction nullifying the instrument: (citations)" *Olympia Bottling Works v. Olympia Brewing Co.*, 56 Or. 87, 99, 107 Pac. 969.

Specifically if the serving industry clause does not modify the second sentence the second sentence cannot stand because there is a lack of consideration for Booth-Kelly to indemnify the railroad for damage jointly caused by the railroad while serving someone else. Furthermore,

> "It is a well-established rule of law that courts should incline, where such a construction is reasonable, to construe a contract in favor of mutuality: (citations)" *Ward v. McKinley*, 97 Or. 45, 54, 191 Pac. 322.

The only possible consideration for Booth-Kelly agreeing to the spur track contract was spur track service. We do not concede that such was consideration under the circumstances of this case, but even if it was consideration it is clear that no consideration moves to Booth-Kelly for its continuing obligations when the railroad was not in fact serving Booth-Kelly. It was not serving Booth-Kelly here. (T. 90)

In summary, the serving industry clause should be construed to modify the second sentence as well as the first sentence in Paragraph 7 of the agreement because first, they constitute a single paragraph, and second, four settled rules of construction require it: (1) construe the instrument as a whole, (2) in case of inconsistency the earlier clause prevails, (3) a contract is construed against its preparer especially if it is a printed form contract, and (4) construe to sustain the instru-

ment, specifically here construe to avoid a lack of mutuality; and, third, the purpose of the agreement was only to serve Booth-Kelly.

SPECIFICATION OF ERROR NO. V

No recovery can be allowed Appellee under the contract as it is an attempt to contract against its own negligence, the contract is void as against public policy under the laws of the State of Oregon as otherwise it would permit Appellee to recover for a loss it sustained through its own negligence. (Appellant's Appeal Point 5, T. 129)

Specifically the court below erred as a matter of law in holding by implication that the indemnity clause (Paragraph 7) of the contract was a valid contract with the result that it erroneously made and entered the following Conclusion of Law:

"Plaintiff is entitled to recover judgment against defendant for the sum of $22,000.00 *on the contract*, together with its costs and disbursements incurred herein." (Emphasis supplied) (Conclusion of Law No. 7, T. 55)

SUMMARY OF THE ARGUMENT OF THE ABOVE SPECIFICATION OF ERROR

POINT ONE: Under the doctrine of ERIE RAILROAD CO. V. TOMPKINS as presently interpreted, a dictum of the Oregon court that an agreement to indemnify an indemnitee against his own negligence is

against public policy settles the law of Oregon for this case.

POINT TWO: Irrespective of any Oregon authority, the general rule is that an agreement to indemnify an indemnitee against his own negligence is contrary to public policy.

ARGUMENT: POINT ONE

Paragraph 7 of the spur contract provides in part that:

> "* * * if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally." (T. 12)

Obviously if this clause is valid under Oregon law the railroad is permitted to recover from the indemnitor Booth-Kelly for the railroad's own negligence.

The question here is then quite simple: is it against the public policy of Oregon for the railroad to enter into a contract to be indemnified against the consequences of its own negligence? The question has not yet been decided in Oregon; yet the Oregon court has unequivocally indicated what it considers to be the law.

In *Southern Pacific Co. v. Layman*, 173 Or. 275, 278, 145 P. 2d 295, the railroad sought to recover on an indemnity clause in a printed form contract allowing the defendant to construct and use a private road crossing

upon the defendant's right of way. The court says at page 278:

> "The question for decision is whether the indemnity clause covers a case of loss suffered by the plaintiff solely as the result of its own negligence in the operation of one of its trains.
>
> "We do not stop to inquire whether the agreement, if so construed, would be valid. That question has not been raised, although, *according to the editors of American Jurisprudence, a majority of the American courts hold that an agreement to indemnify against the negligence of the indemnitee is void as against public policy:* 27 Am. Jur., Indemnity 460, sec. 9." (Emphasis supplied)

The Layman case is a recent one, having been decided in 1944, and the judge's assertion is no casual remark of his own but a statement of the general rule backed by authorities.

The basic problem is the weight which this court will accord to this considered *dictum*. Even before the Supreme Court decided *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, this court said in *Collins v. Streitz*, 95 F. 2d 430, 435, *cert. denied* 305 U.S. 608, 59 S. Ct. 67, 83 L. Ed. 388, discussing a similar problem:

> "The other Arizona case discussing acknowlegments is Larkin v. Hagan, 1912, 14 Ariz. 63, 126 P. 268, 272 rehearing denied July 15, 1912. The language therein contained bearing on the sufficiency of the acknowledgment involved is expressly stated to be unnecessary to the decision. However, in view

of the paucity of authority on the point, it is entitled to great weight. (Citations)"

Since the Erie decision this court affirmed a decision of the Oregon District Court, (133 F. 2d 160) in the case of *American Surety Co. v. Bank of California*, 44 F. Supp. 81. The district court says:

"These (sic) is no binding authority in the state of Oregon upon the exact situation here presented. Many authorities have been cited from other jurisdictions. But calculation of numerical weight of authority from other jurisdictions will not suffice. This court must attempt to give weight to the considerations which, judged from previous utterances, will affect the Supreme Court of Oregon, when that tribunal deals with a state of facts such as is here presented." (P. 83)

He continues at page 87:

"If the Oregon courts were confronted with the facts here involved, it is believed the principles announced in the last quoted case (American Central Insurance Company v. Weller, 106 Or. 494, 212 Pac. 803) would be followed." (Citation inserted)

This court said of the Weller case in its opinion on the appeal:

"Admittedly, the facts vary widely from those in the instant case, but the court's limitation of the subrogation doctrine is significant." (P. 164)

Under the Erie case "the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute." *West v.*

American Telephone & Telegraph Co., 311 U.S. 223, 236, 61 S. Ct. 179, 85 L. Ed. 139.

The court in the West case continues at page 236:

"There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. * * * State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, * * *"

Justice Stone's words of course refer to a failure to conform to the decision of an inferior state court, but their logic is equally applicable here.

His statement that "all the available data" as to what is state law has been followed and applied in many cases; one of which is *Yoder v. Nu-Enamel Corporation*, 117 F. (2d). The Eighth Circuit said at page 489:

"And the obligation to accept local interpretation extends not merely to definite decisions, *but to considered dicta as well.* Hawks v. Hamill, 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610; Badger v. Hoidale, 8 Cir., 88 F. 2d 208, 109 A.L.R. 798. Indeed, under the implications of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, and West v. American Telephone and Telegraph Co., 61 S. Ct. 179, 85 L. Ed. ....., where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any per-

suasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed." (emphasis supplied)

In *Stentor Electric Mfg. Co. v. Klaxon Co.*, 125 F. 2d 820, *rev'd on other grounds* 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, the Third Circuit went further in applying the *West* doctrine of use of all available data than in simply following a dictum. The court said at page 824 that the state court's proneness to use the Restatement should be considered:

"Among the items of data available is the approach of the Delaware Supreme Court to this kind of problem in the Nelson case. * * * It did not have previously decided Delaware cases to settle the point. It examined and cited cases from other states, three current textbooks in the Conflict of Laws and the Restatement. It accepted and applied what was set forth in these sources. This seems to us strong evidence of what the Delaware court would do in a conflict of laws problem, and the case gains additional strength from the fact that it was recently decided."

Recently the same principle has been applied with a federal court noticing that:

> "* * * Delaware courts pay particular attention to the decisions of the Courts of Massachusetts." *Wilmington Trust Co. v. Mutual Life Insurance Co.*, 76 F. Supp. 560, 565.

If these courts go so far as to ascertain the state law, it would seem *a fortiori* that a considered dictum like the one here should be followed.

This continuing expansion of the Erie doctrine to include state court's recognition of rules of laws seems to be endorsed by the Supreme Court in a footnote to *Shelly v. Kraemer*, 334 U.S. 1, 17, 68 S. Ct. 836, 92 L. Ed. 1161:

> "In applying the rule of Erie R. Co. v. Tompkins, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 144 A.L.R. 1487, it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State."

Similarly the following circuit court decisions indicate a like trend. The Fifth Circuit said in *Meredith v. Board of Public Instruction*, 112 F. 2d 914, 916, *cert. denied*, 314 U.S .656, 62 Ct. 109, 86 L. Ed. 526:

> "When that court has not ruled upon the precise question involved, we apply the law as we understand it to be in that state."

The Sixth Circuit said in *Princess Garment Co. v. Fireman's Fund Ins. Co.*, 115 F. 2d 380, 383:

> "The Supreme Court of the State of Ohio has not yet passed directly upon the questions here present-

> ed and we have applied the rule that this court will exercise an independent judgment in determining the law with respect to the issues here presented based upon whatever principles of state law are applicable."

Finally the Third Circuit in *Jackman v. Equitable Life Assur. Soc.*, 145 F. 2d 945, 947, said:

> "In order to apply local law where there is no authoritative local decision or statute, it is incumbent upon a federal court to ascertain and apply what it believes to be the law which a court, authorized to speak the law of the particular State, would apply if called upon to adjudicate upon like circumstances."

In summary, Paragraph 7 of the spur track agreement seeks to indemnify the railroad against its own negligence. We contend that such an agreement is contrary to public policy in Oregon; and the Oregon court has asserted that the general rule is that such agreements are void in order to avoid any suggestion that it was accepting by inference the validity of such agreement in *Southern Pacific Company v. Layman*, *supra*. Under the doctrine of *Erie Railroad Co. v. Tompkins*, *supra*, as presently applied by the Supreme and Circuit Courts such a considered pronouncement as to the general law must be followed in this case since it clearly indicates what the Oregon court conceives to be the law. Even apart from *Erie Railroad v. Tompkins*, *supra*, the federal courts are required to follow state law on this

subject matter since it was expressly left to the states by the Interstate Commerce Act previously set out and by case law generally apart from any statute. *Hartford Ins. Co. v. Chicago & C. Railway*, 175 U.S. 91, 20 S. Ct. 33, 44, L. Ed. 84.

ARGUMENT: POINT TWO

If this court does not deem itself bound by the Layman dictum as to the Oregon law on indemnity against one's own negligence, the contract here sued upon is void as against public policy by the general rule.

Many cases so hold:

Nashua Gummed & Coated Paper Co. v. Noyes Buick Co., 93 N.H. 348, 41 A. 2d 920.

Otis Co. v. Maryland Co., 95 Colo. 99, 33 P. 2d 974.

Johnson's Admx. v. Richmond & D. R. Co., 86 Va. 975, 11 S.E. 829.

Accord: Wessman v. Railroad, 84 N.H. 475, 162 A. 476.

Fairfax Gas & Supply Co. v. Hadary, 151 F. 2d 939.

City of Gary v. Bontrager Const. Co., 113 Ind. App. 151, 160, 47 N.E. 2d 182.

See: Jankele v. Texas Co., 88 Utah, 325, 329, 65 P. 2d 425.

City of Phila. v. The Phila. Gas Works Co., 49 D. & C. (Pa.) 314, 322.

SPECIFICATION OF ERROR NO. VI

There was no breach of contract. Appellee's loss did not result through breach by Appellant of the contract. Any breach of the contract was fully known to Appellee and was waived by it. (Appellant's Appeal Point 1, T. 128.)

Appellee is estopped by its conduct from asserting that alleged breach of contract caused its loss as a custom of operation had been developed between the parties covering the removal of any obstruction to track clearance upon request of Appellee. (Appellant's Appeal Point 2, a, T. 128-9.)

The claimed breach of clearance was discovered by Appellee long prior to damage and therefore such damage was not caused by the claimed breach. (Appellant's Appeal Point 2, b, T. 129.)

The above points raise questions which are substantially alike and in the interests of brevity and convenience the three above points are consolidated and treated as a single specification of error.

Specifically the court below erred in making the following Findings of Fact since there was no evidence to support them:

"The placing and leaving of the wood cart within 42 inches from the track was a breach of the provisions of said agreement relating to impaired clearances." (Finding of Fact No. 21, T. 54.)

"The damage to Powers and the liability of plaintiff was the natural or necessary result of defendant's breach of contract." (Finding of Fact No. 13, T. 53-54.)

"There was no custom or practice between the parties under which plaintiff would give notice to defendant of any objectionable obstruction to track clearance or of defendant moving the same at the request of the plaintiff." (Finding of Fact No. 19, T. 54.)

The court below further erred as a matter of law in making and entering the following conclusion of law:

"Plaintiff did not waive defendant's breach of contract." (Conclusion of Law No. 3, T. 55.)

SUMMARY OF THE ARGUMENT OF THE ABOVE SPECIFICATION OF ERROR

POINT ONE: There was no breach of the spur track contract relating to clearance.

POINT TWO: If there was a breach, appellee's loss did not result from alleged breach.

POINT THREE: If there was a breach, appellee can claim no benefit thereby since he waived any breach and in any case was estopped by the custom of the parties as to the removal of any obstruction.

ARGUMENT: POINT ONE

Paragraph 5 of the agreement is in part as follows:

"Industry agrees that without the written consent of Railroad first had and obtained, no structure, material, pole, cable, wire, conduit, pipe, opening, excavation or obstruction of any character shall be erected, piled, made, stored or maintained upon or over the premises of Railroad, or beneath any track

upon the premises of Railroad. In the event such written consent is given, Industry agrees to comply with the following minimum clearances: . . ." (T. 8)

As is evident the words refer to such things as structures and pipes. The only possible way an iron-wheeled wood cart could be covered is by the catch-all phrase: "obstruction of any character." By the application of the familiar principle of ejusdem generis, the particular words like structure, pipe, and excavation control the meaning to be attributed to the general word "obstruction." *Smith v. First Nat. Bank*, 114 Okla. 293, 245 Pac. 653. These words uniformly refer to fixed objects or to objects which if they move, move in a very limited range. Doors, windows, and gates, objects which are customarily movable are treated specially later on in the paragraph, but not wood carts so the inference is that they are not covered by the agreement. This inference is strengthened by the requirement that written permission is to be obtained for maintaining such on the premises of the railroad. It is hardly likely that the lumber company was to get permission if a "hyster" was moved onto the railroad's premises to load a freight car. Here the "obstruction" was a movable vehicle, a wood cart, and it is no less tenuous to claim that written consent must be obtained to move it onto the railroad premises adjacent to the mill. And it is only if written

consent is given (required) that Industry agreed to comply with the stated minimum clearances.

ARGUMENT: POINT TWO

We have previously argued, Specification of Error No. II, point two, that leaving the cart near the tracks was not the proximate cause of the damage to Powers and the consequent liability of the plaintiff the argument here is substantially the same and that section will not be repeated. It should be noted that the only breach alleged is the leaving of the wood cart near the tracks. Merely creating a condition in which the negligence of others may be effective does not amount to proximate causation since this defendant is not required to anticipate the negligence of the railroad. *Wm. Cameron & Co. v. Thompson*, ... Tex. Civ. App. ....., 175 S.W. 2d 307 (unblocked hand truck rolling out of freight car). In *Central of Georgia Ry. Co. v. Swift & Co.*, 23 Ga. App. 346, 98 S.E. 256, the court, where the railroad had failed to warn an employee of a danger or to light it, held:

> "The act of the railroad company in thus voluntarily operating its train along said private track and under said shed, and in such undisproved negligent manner did not amount to mere legal, passive acquiescence in the negligence of the oil company in maintaining the shed in a dangerous condition, but such active, positive and negligent conduct on the part of the railroad itself amounted to an actual participation by it in the *proximate* cause of the homicide." (Emphasis supplied)

In *Glappa v. Detroit, etc., R. Co.* 179 Mich. 76, 80, the court in speaking of sand on a private side track which the industry served had contracted to remove said:

> "If the cars had not been moved, the plaintiff would not have been injured. It was the alleged negligent movement of the cars over the accumulated sand which caused the injury."

So here it was the movement of the cars which caused the injury not the cart being left within 42 inches of the track.

Furthermore the movement of the cars was negligent here. The finding of the court that:

> "Employees of plaintiff observed the position of the cart and operations continued thereafter prior to the accident." (T. 54)

is well substantiated. Both the conductor and engineer testified that they noticed the cart three or four days prior to the accident having been in there several times in that period (Reporter's Transcript, *Powers v. Southern Pacific*, P. 20, 83-4). The fireman also saw it several times and in fact when he first saw it had warned the engineer but the engineer on the basis of his previous experience indicated he would clear it. The fireman knew that he noticed this on January 30th the first day he had returned to work. (Reporter's Transcript, P. 88-89.)

The accident happened on February 8th, so both

the engineer and fireman had known about the obstruction for at least 8 days. The other brakeman noticed the cart on the way in with the train load of logs. (Reporter's Transcript, P. 80.) Counsel for the Southern Pacific in the Powers case stated in his argument to the jury:

> "It has been an admitted fact all the way along, that the wood cart was there three or four days. One witness said from January 30th, but every member of that crew knew, except Mr. Powers. * * *"
>
> "Mr. Powers had been in the Booth-Kelly plant as much as anybody else on that crew, and that crew worked regularly. One witness said he remembers distinctly going in the day before. Another witness said two or three days before. We know they were in there on the 30th. We know that they were in there pretty regularly, * * *" (Reporter's Transcript, P. 283-4.)

He continued:

> "These men in the crew, if they knew it was in there—and they all knew, all of them,—if they thought they were going to get hurt, they could have refused to switch. They did not have to go in if they thought it was as dangerous as all that.
>
> "But they all knew it was there, that is the fact, and all knowing that it was there, they went on in, and there was plenty of room, the engineer told you that." (Reporter's Transcript, P. 306.)

This particular train was in charge of a conductor. (T. 34) Despite this and the knowledge of every other member of the crew, Powers was not warned of the location of the cart. (Reporter's Transcript P. 130) Furthermore Powers was descending backwards from the

car when struck (Reporter's Transcript P. 165) yet counsel for the railroad stipulated:

> "No signs were posted in or on the caboose regarding the manner of detraining." (T. 109)

Neither the conductor nor the railroad gave any notice that the clearance was impaired as is required by company rules:

> "Rule 1094, Rules and Regulations of Maintenance of Way and Structures, Southern Pacific Company, Pacific Lines, dated November 15, 1943: (set out in part)
>
> "Where occupants of company property under lease encroach upon standard clearances with buildings, lumber, coal piles or other obstructions, they must be courteously notified to comply with standards." (Reporter's Transcript, Pp. 21-22.)

Finally to switch on an obstructed track is itself negligent if the railroad employees know of the obstruction. In *Kanawha Railway v. Kerse*, 239 U.S. 576, 579, 36 S. Ct. 174, 60 L. Ed. 448, the court said of a switch track obstructed by a board across the track approximately 3 to 4½ feet above the top of a box car:

> "The action of the Railway Company through its employees, in conducting its switching operations upon a switch obstructed, as this one was, in such manner as to endanger the lives of brakemen upon its cars, speaks so clearly of negligence that no time need be spent upon it. The evidence that the timber had been in the position described for a considerable period of time was presumptive evidence of notice to the company; besides which, the switch engineer

and conductor both testified to actual knowledge on their part, prior to the time of the accident to Barry."

In summary it is clear that the Southern Pacific loss did not result from any breach of the contract in leaving the cart near the track since the railroad knew of such condition and failed to warn its employee and also persisted in switching on this obstructed track which operation is itself negligence.

ARGUMENT: POINT THREE

The knowledge of the railroad's employees, and in particular, of the conductor in charge of the crew repeatedly using this switch despite its obstruction constituted a waiver of any breach of the contract. In *Cross v. Campbell*, 173 Or. 477, 493, 146 P. 2d 83, the court states:

> "It is axiomatic that a party to a contract may waive performance of any of its provisions if he so chooses."

In *Smith v. Martin*, 94 Or. 132, 138, 185 Pac. 236, the court considered waiver of a non-assignability provision in a contract and stated:

> "Such waiver may be proved by parol and by circumstantial evidence, as well as by direct testimony."

Here parol and circumstantial evidence shows a waiver.

The court continues in the Martin case:

> " 'Waiver' is a voluntary relinquishment of one's known right, and may be by the acts of the party * * *" (P. 138)

Here the acts of the railroad through its employees, especially the conductor, in continuing to operate constitutes a waiver.

Finally this court considered waiver in a contract to which a railroad was a party: *Stannick v. Jones*, 252 Fed. 345, *modified* 256 Fed. 354, *motion denied* 258 Fed. 990, *cert. denied* 250 U.S. 664, 40 S. Ct. 11, 63 L. Ed. 1196. Headnote 6 states:

> Where no objection was made to defendant's delay in furnishing money to construct a railroad, such delay, though a technical breach of the contract, must be deemed waived, and does not deprive defendant of the right to enforce a forfeiture in event of nonperformance by the opposite party."

ESTOPPEL BY CUSTOM

We also contend that the Southern Pacific is estopped to assert that the alleged breach caused its loss as a custom of operation had developed between the parties as to how obstructions to clearance which were forbidden by contract were to be disposed of. Industry agreed that no obstructions were to be maintained without written permission. (T. 8) The contract does not cover the frequent contingency of the tracks being obstructed by Industry without Industry's actual knowl-

edge. For example pieces of lumber were frequently dropped. (T. 102) The parties had developed a way to handle this problem: the railroad employees, especially the depot agent, would notify Booth-Kelly of such obstruction and they would be removed. (T. 99-101) In fact such a procedure was required by the Southern Pacific's Rule 1094 previously set out in part.

It is not unreasonable then to suppose that such was the method of handling track obstructions on spur tracks wherever operated by the Southern Pacific. On a somewhat similar problem the Oregon court in *Green Mt. Log Co. v. C. & N. RRR.*, 146 Or. 461, 471, 30 P. 2d 1047 said:

> "It appears that there were 11 shippers of logs over the defendant's railroad at the time mentioned, and the testimony tended to show that the custom of scaling the logs according to the freight scale prevailed and was generally known to the shippers over this railroad.
>
> "A railroad tariff is to be considered much the same as a statute or contract: (Citations) Parol evidence is admissible and every fact is relevant which shows how the usage in particular instances was understood and acted upon by the parties then interested. Particular instances of the parties' previous course of dealing may be shown to establish knowledge of the usage: 17 C.J. 520, 521, section 87."

We do not seek to vary the written contract here. We do rely on a usage which developed between the parties to cover certain contingencies not covered by

the contract; that usage though controlling the relationship of the parties here is not in addition to the contract but relates to a separate matter, how to deal with material which admittedly had no right near the tracks. The contract only created the unimplemented right of the tracks to be free of obstructions.

This usage on which we rely is attested to by "particular instances in the parties' previous course of dealing" and by the railroad's rules themselves. The railroad's rules on this matter probably recognize a widespread custom in dealing with obstructions on spur tracks. Finally it is well established that:

> "The practical interpretation of the terms of a contract made by the parties while performing it is universally deemed a safe guide to the intended meaning of the instrument." *Kontz v. B. P. John Furniture Corporation*, 167 Or. 187, 203, 115 P. 2d 319.

CONCLUSION

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented herein, and that this case should be reversed.

Respectfully submitted,

VEAZIE, POWERS & VEAZIE,
and JAMES ARTHUR POWERS,

APPENDIX

45 U.S.C.A. section 51:

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

"Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, section 1, 35 Stat. 65; Aug. 11, 1939, c. 685, section 1, 53 Stat. 1404."

45 U.S.C.A. section 55:

"Contract, rule, regulation, or device exempting from liability; set-off

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any

liability created by this chapter, shall to that extent be void: * * * Apr. 22, 1908, c. 149, section 5, 35 Stat. 66."

49 U.S.C.A. section 2:

"**Special rates and rebates prohibited.** If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, c. 104, section 2, 24 Stat. 379; Feb. 28, 1920, c. 91, section 404, 41 Stat. 479.)"

The above is the text of statute when *China Fire Ins. Co. v. Davis*, 50 F. 2d 389, was decided. Present text is identical except that matter relating to transmission of messages is deleted.

8 O.C.L.A. section 113-108 provides in part:

"**Construction and maintenance of switch connections: Conditions governing: Preference for live-**

stock and perishable goods: Proceedings on failure to construct switch: Complaint and investigation: Order: Sharing of expenses. Any railroad * * * upon application of * * * any shipper tendering intrastate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any * * * private side track which may be constructed, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same, and shall furnish cars and transport to the best of its ability any traffic tendered to over or from such * * * private side track, without discrimination in favor of or against such shipper; provided, this shall not be construed to compel a railroad to remove from or deliver on a private side track traffic tendered in less than carload lots; * * * If any railroad shall fail to install and operate any such switch or connection as aforesaid on application therefor in writing by * * * any shipper * * * shipper may make complaint to the railroad commission (public utilities commissioner) of Oregon in the manner provided by sections 113-140, 113-148 and 113-149, and the said railroad commission (public utilities commissioner) of Oregon shall make investigation of the same as provided in the said sections, and shall determine as to the safety, practicability and justification thereof, and shall ascertain the items of reasonable cost of making such connection, and shall make an order as provided in said sections 113-140, 113-148 and 113-149, directing the railroad to comply with the provisions of this section in accordance with such order. Such order shall be enforced as other orders of the said railroad commission (public utilities commissioner) of Oregon fixing a reasonable service are enforced. The railroad shall furnish the rails and fastenings, and the switch, complete with frog and guard rails, and the ties and grading shall be furnished or the expense borne by applicant. (L. 1909,

ch. 208, p. 303; L.O.L. section 6901; O.L. section 5847; O.C. 1930, section 61-120.)

8 O.C.L.A. section 113-110:

"Penalty for violation of section 113-109. If any company or corporation owning or operating any railroad in this state shall fail or refuse to comply with the provisions of this act, the person injured by such failure or refusal shall be entitled to recover against such railroad company, in any court having jurisdiction, a penalty of $300 for each week during which such neglect, failure, or refusal shall continue."